

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

HERMAN ROSENBORO)	
)	
v.)	NO. 2:05-CV-15
)	2:00-CR-71
UNITED STATES OF AMERICA)	

MEMORANDUM OPINION AND ORDER

This criminal matter is before the Court to consider the Report and Recommendation, [Doc. 39 in 2:05-CV-15 and Doc. 327 in 2:00-CR-71], of the United States Magistrate Judge dated March 27, 2008. In that Report and Recommendation, the Magistrate Judge recommends that the defendant's motion to vacate pursuant to Title 28 United States Code Section 2255, [Doc. 1 in 2:05-CV-15 and Doc. 267 in 2:00-CR-71], be denied. The defendant has filed objections to this recommendation, [Doc. 40 in 2:05-CV-15].

After careful and *de novo* consideration of the record as a whole, and consideration of the Report and Recommendation of the United States Magistrate Judge, and for the reasons set out in that Report and Recommendation, which are incorporated by reference herein, and for the reasons discussed below, it is hereby

ORDERED that the defendant's objections are **OVERRULED**, that this Report and Recommendation is **ADOPTED** and **APPROVED**, with the elaborations below, and that the defendant's motion to vacate be **DENIED**, [Doc. 1 in 2:05-CV-15 and Doc. 267 in 2:00-CR-71].

Defendant objects to the Magistrate Judge's reliance upon the affidavit of the AUSA who tried the case and claims that it is improper hearsay testimony. However, affidavits of counsel are relied upon by the courts in determining section 2255 motions. *See Cummings v. United States*, 84 Fed. App. 603, 605 (6th Cir. December 15, 2003) (District Court does not commit clear error by crediting defense counsel's affidavit stating that defendant had not asked counsel to file appeal); *Odum v. United States*, 229 F.3d 1153 (Table, text at 2000 WL 1175598, *3 (6th Cir. 2000)) (It is not clearly erroneous for district court to rely on affidavit by defense counsel stating that defendant never requested his counsel to file appeal); *Robinson v. United States*, 2005 WL 2417045, **3-4 (E.D. Tenn. Sept. 30, 2005). In addition, this Court accepts the other reasons stated in the Magistrate Judge's Report and Recommendation in finding that trial counsel was not ineffective.

In the defendant's fourth objection, he objects to the recommendation that the petitioner be denied relief on his Sixth Amendment claim regarding his prior convictions and to his Eighth Amendment claim regarding cruel and unusual

punishment. In addition to the reasons found by the Magistrate Judge, this Court notes that the defendant has procedurally defaulted the consideration of these issues because he raised them for the first time in his section 2255 motion. *See United States v. Henry*, 71 Fed. Appx. 493 (6th Cir. 2003) (petitioner's direct appeal); *see also United States v. Frady*, 456 U.S. 152, 166 (1982); *Elzy v. United States*, 205 F.3d 882, 884 (2000).

Thus, for the reasons stated, it is hereby **ORDERED** that the petitioner's objections are **OVERRULED**, that the Report and Recommendation is **ADOPTED** and **APPROVED** with the elaborations above, and that the defendant's motion to vacate be **DENIED**, [Doc. 1 in 2:05-CV-15 and Doc. 267 in 2:00-CR-71].

E N T E R:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE